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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. 75-1617

JANENE RILEY, by and through
her mother and next friend,
DELORES RILEY, et al.,

Petitioners,

vs.

BETTY STEPHENS, et al.,

Respondents.

REPLY BRIEF OF PETITIONERS

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This reply brief on behalf of Petitioners herein is filed pursuant to Rule 24, Rules of the Supreme Court. The purpose of filing this brief is to respond to certain statements contained in the brief filed by the Respondents Warren County Commissioners opposing the petition for a Writ of Certiorari.

Respondents have asserted that the instant petition presents no conflict with this Court's decision in *Scheuer* v. *Rhodes,* 416 U.S. 232 (1974), and that no deprivation of constitutional rights is presented by this case. For reasons which are set forth herein, Petitioners respectfully submit that Respondents' interpretation of the decision in *Scheuer* v. *Rhodes* is incorrect, and that the circumstances of this

action bring before the Court in the clearest and purest form imaginable the constitutional deprivations which result solely and directly by virtue of the application of the doctrine of sovereign immunity.

As correctly noted in Respondents' brief, Petitioners did allege in the trial court that said Respondents were negligent in hiring Betty Stephens. Petitioners have already pointed out to this Court that during the trial involving the remaining defendants there was strong evidence that the school bus driver not only was untrained in the operation of her vehicle, but had complained frequently to her superiors that she was unable to handle it properly. These allegations thus bring this case squarely within the holding of *Scheuer,* in which damages were being sought in redress for the tortious conduct of the state officials. Just as those individuals had a personal interest in the outcome of the case, Cf. 416 U.S. at 237-38, the Respondents have such an interest in the outcome of this case. The Supreme Court of Ohio, in affirming the Appeals Court's affirmance of the Respondents' motion for summary judgment, has held that sovereign immunity is an absolute bar to any and all actions for damages against governmental officials even where it is alleged that they were personally negligent in their conduct toward the minor plaintiff.

Respondents argue, however, that Petitioners were not effectively deprived of their rights to Equal Protection and Due Process of Law guaranteed by the Fourteenth Amendment to the Constitution of the United States of America. Petitioners submit that it is in precisely this regard that their claims for redress from his Court are the most deserving. As Justice Cardozo once stated:

> "I think that when a rule, after it is has been duly tested by experience, has been found to be inconsistent with the sense of justice, or with the social welfare, there should be less hesitation in frank avowal and full abandonment."

Cardozo, *The Nature of the Judicial Process,* page 152, Yale University Press (1921).

If ever a set of circumstances presented the case of a rule which has been tested by experience and found wanting, it is that presented by this petition. The Petition for Writ of Certiorari previously filed herein referred to the opinion of Justice Traynor in *Muskopf* v. *Corning Hospital District,* 55 Cal.2d 211, 11 Cal. Rptr. 89, 359 P.2d 457 (1961), in which that Court eloquently abolished the sovereign immunity doctrine in California. To date, no fewer than 21 states have abolished sovereign immunity in tort, with the most recent decision coming from the Supreme Court of Minnesota. Thus, Alaska (1973), Arizona (1963), California (1961), Colorado (1971), Hawaii (1968), Idaho (1970), Illinois (1967), Indiana (1972), Iowa (1975), Kansas (1975), Minnesota (1975), Nebraska (1971), New Jersey (1970), New Mexico (1975), New York (1963), Oregon (1974), Pennsylvania (1973), Utah (1968), Vermont (1973), Washington (1974) and Wisconsin (1962), have accomplished this end either by statutory means or by judicial fiat. See cases collected in *Nieting* v. *Blondell,* 235 N.W.2d 597, 602, Note 9-13 (Minn. 1975).

An immunity in the legal sense, which avoids liability under all circumstances, is conferred, not because of the particular facts of a case, but because of the status or position of the favored party; it does not deny the tort, but only the resulting liability. W. L. Prosser, Law of Torts, 996 (3d Ed. 1964). Concerning the history and effect of the doctrine of sovereign immunity, the California Supreme Court, speaking through Chief Justice Traynor in the case

of *Muskopf* v. *Corning Hospital District, supra,* had this to say:

> ". . . At the earliest common law the doctrine of 'sovereign immunity' did not produce the harsh results it does today. It was a rule that allowed substantial relief. It began as the personal prerogative of the King, gained impetus from sixteenth century metaphysical concepts, may have been based on the misreading of an ancient maxim, and only rarely had the effect of completely denying compensation. How it became in the United States the basis for a rule that federal and state governments did not have to answer for their torts has been called 'one of the mysteries of legal evolution.' . . ." 55 Cal.2d 211 at 214, 11 Cal. Rptr. 89 at 90-91, 359 P.2d 457 at 458, 459 (1961).

The following discussion of the evolution of the doctrine, which appears in *Smith* v. *State,* 93 Idaho, 795, 473 P.2d 937 (1970), confirms Justice Traynor's observation:

"The early case of Mower v. Inhabitants of Leicester, 9 Mass. 247 (1812), set precedent which has been followed by most state courts in the United States. As sometimes is the case, a court will enunciate a principle of law, citing authorities and reasons supporting its decision, only to find that in time the case is widely cited for a proposition of law unrelated to the original question presented by the case. The Supreme Judicial Court of Massachusetts in Mower v. Inhabitants of Leisester, supra, relied on the reasoning of an earlier English case, Russel v. The Men of Devon, 100 Eng. Rep. 359 (K.B. 1788), in which the court held that an unincorporated governmental unit was not liable for injuries resulting from a defective bridge since it was better that an individual should sustain an injury than the public should suffer the inconvenience of collecting monies and then paying them to the injured party. It is evident there was no basis in law or fact for the Massachusett's

> court in Mower v. Inhabitants of Leicester, supra, to apply the rule of Russel v. The Men of Devon, supra, since the town of Leicester was incorporated and could have satisfied a judgment. Yet in spite of these distinguishing features the rule became firmly entrenched not only in Massachusetts but also in the majority of American jurisdictions." 473 P.2d at 942.

In short, sovereign immunity is a doctrine whose genesis was accidental, and whose perpetuation is the result of inertia.

One of the paramount interests of the members of an organized and civilized society is that they be afforded protection against harm to their persons, properties and characters. The logical extension of that interest, is that, if harm is wrongfully inflicted upon an individual in such a society, he should have an opportunity to obtain a reasonable and adequate remedy against the wrongdoer, either to undo the harm inflicted or to provide compensation therefor. If the state is to properly serve the public interest, it must strive, through its laws, to achieve the goals of protecting the people and of providing them with adequate remedies for injuries wrongfully inflicted upon them. So long as the state fails to do so, it will be functioning in conflict with the public interest and the public good. See *Nieting* v. *Blondell, supra.*

The decisions of the Ohio courts in this case conflict not only with the constitutional rights to equal protection and due process of law of the petitioners but with the decisions and statutory enactments in the 21 jurisidictions enumerated above as well. Sovereign immunity runs directly contrary to the basic concept, underlying the entire field of tort law, that liability follows negligence and that individuals and corporations are responsible for the negligent acts of their agents and employees acting in the

course of their employment. Petitioners, however, have thus far been denied their opportunity for redress for the loss of the minor Petitioner's legs, brought about by the negligence of the Respondents. Nor will Petitioners have a chance to recover against these Respondents under Chapter 2743 (Appendix IV), Ohio Revised Code, which waived the tort immunity of the State as of January 1, 1975. Sec. 2743.01 (A) provides that the waiver by the State does not include "political subdivisions," which are defined in Sec. 2743.01 (B) to include "Municipal Corporations, Townships, Villages, Counties and School Districts and all other bodies corporate and politic responsible for governmental activities only in geographic areas smaller than that of the state . . ."

Thus, without the assistance of this Court, Petitioners, under the statutes and court decisions as they exist today, will be prevented from ever proceeding in a court of law against these Respondents. The compelling facts of this case demand that the archaic and misbegotten doctrine of sovereign immunity, which has become lodged in the statutes of Ohio and which the courts of Ohio have thus far refused to dislodge, be reviewed by this Court.

Respectfully submitted,

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